

Mr. Steak, Inc. and Linda Manville. Case 7-CA-20056

26 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER

On 17 January 1983 Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.²

We agree with the Administrative Law Judge's findings that Respondent violated Section 8(a)(1) by discharging employee Linda Manville because she complained about working conditions and incited other employees to complain following Respondent's discharge of Restaurant Manager Kathy Manville. In reaching this conclusion, we note that, following Respondent's termination of Kathy and its subsequent appointment of a new manager, employees began experiencing difficulties in scheduling and staffing. There also was dissatisfaction over the elimination of cigarette breaks and free meals, and over a new requirement that waitresses obtain permission to use the washroom. Employees discussed these problems at their breaktimes. About a month after Kathy's termination, Linda and employee Maureen Manville attempted to phone Respondent's president, Jackson. When they were unable to reach Jackson immediately, they left messages for him. Later that day, Jackson returned the calls and reached Maureen who complained to him about scheduling, staffing, and Kathy's termination. Later that same day, the restaurant's new manager,

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² The Administrative Law Judge inadvertently failed to include in the expunction provision of his recommended Order a requirement that Respondent notify Linda Manville in writing that it has expunged from its files any reference to her discharge and that evidence of the unlawful discharge will not be used as a basis for future personnel action against her. We shall modify the recommended Order accordingly. See *Sterling Sugars*, 261 NLRB 472 (1982).

Naumovski, learned of these phone calls and called Linda into his office. *Inter alia*, Linda told him that she had tried to call Jackson to complain about Kathy's termination and working conditions. The following day, Naumovski terminated Linda for disrespect toward management and for inciting Maureen to have the same attitude. In these circumstances, as further elaborated on by the Administrative Law Judge, we agree that Linda's participation in the concerted protest over the perceived deterioration of working conditions was protected concerted activity and that Respondent terminated Linda because of her participation in this protected activity. We also agree that Respondent failed to establish that it would have terminated Linda even in the absence of her protected concerted activities. *Wright Line*, 251 NLRB 1083 (1980). In these circumstances, we find it unnecessary to pass on the Administrative Law Judge's further findings that employee complaints about the termination of Restaurant Manager Kathy Manville were part of the protected concerted protest about working conditions and that employees had a legitimate concern with Kathy's identity and continued presence.³

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Mr. Steak, Inc., Riverview, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(b):

"(b) Expunge from its files any reference to the discharge of Linda Manville and notify her in writing that this has been done and that evidence of her unlawful discharge will not be used as a basis for future personnel actions against her."

3. Substitute the attached notice for that of the Administrative Law Judge.

³ Member Hunter disavows the Administrative Law Judge's finding that employee complaints over the termination of the restaurant manager constitute protected concerted activity. However, he agrees that Respondent terminated Linda Manville because of her participation in the concerted protest over the perceived deterioration in working conditions and thus violated Sec. 8(a)(1) of the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

Accordingly, we give employees these assurances:

WE WILL NOT discharge employees because they engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Linda Manville immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and WE WILL make her whole for any loss of earnings she may have suffered as a result of our discrimination against her, with interest.

WE WILL expunge from our files any reference to the discharge of Linda Manville and WE WILL notify her in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel action against her.

MR. STEAK, INC.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: This case was heard in Detroit, Michigan, based on an unfair labor practice charge filed by Linda Manville, an individual, on November 24, 1981, and a complaint issued by the Regional Director for Region 7 of the National Labor Relations Board, herein called the Board, on January 12, 1982. The complaint alleges that Mr. Steak, Inc.,

herein called Respondent, violated Section 8(a)(1) of the National Labor Relations Act, herein called the Act, by discharging Linda Manville because she engaged in the protected concerted activity of protesting working conditions. Respondent's timely filed answer denies the commission of any unfair labor practices.

All parties were afforded full opportunity to appear, to examine and to cross-examine witnesses, and to argue orally. The General Counsel and Respondent have filed briefs which have been carefully considered.

Upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS—PRELIMINARY
CONCLUSIONS OF LAW

Respondent is a Colorado corporation engaged in the operation of restaurants and the retail sale of food and beverages. Its Riverview, Michigan, restaurant is the only facility involved herein. Jurisdiction is not in dispute. The complaint alleges, Respondent admits, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICE

A. *The Facts*

Respondent's work force at the Riverview Restaurant during the period covering these events included at least five members of the Manville family. Kathy Manville was the restaurant's manager; she had hired several of her sisters or sisters-in-law. Among these were Linda Manville, the alleged discriminatee, Marianne Buza, Maureen Manville, and Amy Manville.¹ As manager, Kathy was responsible for the waitresses and hostesses and set their weekly schedules. Kathy, it appears, was well liked and respected by most of the dining room employees.

Notwithstanding her apparent popularity, Kathy's employment by Respondent ended on October 25, 1981,² under circumstances which, though not fully described in this record, appear to have been less than entirely voluntary or amicable. On October 26, Douglas McKinnon, the district manager, held a meeting of the employees wherein he told them of Kathy's termination. On that same day, Amy circulated a letter, addressed to Richard Jackson, Respondent's president, wherein it was claimed that Kathy, allegedly "the finest, most loyal and supportive manager your corporation could have ever had," was forced, by the harassment of the district manager, to quit. Approximately 36 employees signed that letter and it was sent to Jackson in Denver, Colorado.

As indicated by the substantial support given Amy's letter to Jackson, the employees were upset over Kathy's departure. As described in general terms by John Claro, Respondent's galley supervisor, the employees' fondness

¹ For ease of reference, the various members of the Manville family will be referred to herein by their first names.

² All dates hereinafter are 1981 unless otherwise specified.

for Kathy turned to a dislike of Respondent after her departure and her termination became a subject of daily discussion among the employees. Particularly upset, as might be expected, were Kathy's sisters; both Linda and Maureen Manville were observed, in particular, to react emotionally to this change in circumstances.

In addition to participating in the discussions with her fellow employees, Linda testified that she discussed Kathy's termination with Associate Manager Jean Hogan³ and Tom Naumovski, the manager who was brought in to replace Kathy in early November.⁴

When Kathy had been responsible for the staffing and weekly scheduling of the waitresses and hostesses, these functions had apparently been performed to the employees' satisfaction. However, Hogan encountered problems on assuming these responsibilities. One employee described her as sometimes forgetful. Employees were scheduled to work more or less hours than they wanted or at hours when they were not available. Linda testified that she mentioned the scheduling problem to Naumovski, who referred her to Hogan. Linda then allegedly complained to Hogan. Other than recalling that she had complained about an alleged new rule prohibiting employees from switching their days off however, she gave no specifics concerning her discussions with Hogan and could not recall Hogan's responses to her complaints. Maureen and Ann Sherman both testified that they had discussions with Hogan about problems with their own schedules. According to Sherman, when such problems were pointed out to Hogan they were rectified.

There were, according to Linda and certain other witnesses proffered by the General Counsel, other changes made following Kathy's termination. A reduction in staffing (at least as perceived by some employees), an elimination of cigarette breaks and free meals, and a requirement that the waitresses secure management's permission prior to using the washroom were some of the alleged changes. The problems engendered by such changes were discussed among the employees at the table where they took their breaks. There is no evidence that management participated in any of these discussions, overheard them, or interfered with them in any way. Linda testified, only in general terms, that she discussed working conditions with Naumovski; she gave no specifics of any such conversations.

On November 20, Linda, together with her sister Marianne and her sister-in-law Maureen, decided to call Jackson to discuss Kathy's termination and, according to Linda, also to discuss "working conditions." Jackson was not in when Linda called and she left her name. Maureen did the same. Jackson returned their telephone calls at or about 1 or 2 p.m. on that same day. He asked to speak with either one of them, and spoke with Maureen. Maureen testified that she had initiated the call because:

³ The complaint does not allege Hogan to be either a supervisor or agent; however, it is clear from her authority to schedule the working hours of the waitresses and hostesses that she was a supervisor within the meaning of Sec. 2(11) of the Act.

⁴ Linda gave no specifics as to the dates or contents of these conversations. Naumovski's description of one such conversation, occurring on or about November 20, is described *infra*.

We wanted some straight answers. We want to know also if he was aware what was going on in the restaurant . . . about the conditions in the restaurant as far as the scheduling, and also I guess to straighten out my sister's character, what had been said by Mr. McKinnon.

She described their conversation as follows:

I asked him if he was aware what was happening at the Riverview restaurant and if he had heard any of the things that were being said [about] Kathy as far as drinking and what had been said at the meeting by Mr. McKinnon about the books, which was inquiring about stealing. I also asked him if he knew of the uproar at the restaurant, how unhappy everybody was about Kathy being fired, and that we felt that we deserved some answers for it. I told him about the scheduling. . . . That everybody was very dissatisfied with the changes, with the days off. Some people needed them for school and they had to be switched around and double shifts. . . . I remembers saying about the staff being short. . . . Sunday we worked with six girls and we needed eight.

Jackson told Maureen that he would talk with the employees when he was next in Detroit, in about 3 weeks.⁵

When Linda reported for work on November 20, at or about 4:10 p.m., Naumovski called her into his office. He asked what she thought of Mr. Steak as a company and as a restaurant and whether she respected him. Linda replied that she respected the company as her place of employment but had a hard time respecting its policies. She said that she understood that Naumovski was in a difficult position, having come in at a difficult time, and further said that he would have to earn her respect. She also told Naumovski of her attempt to call Jackson in order to make a plea "about Kathy's resignation and working conditions." She claimed to have said something to Naumovski about "working conditions" but could not remember any details.

As Naumovski remembered this conversation, he had called Linda into his office because her attitude toward the customers reflected that she was having a problem; he wanted to find out what that problem was. She then told him about Kathy's termination and, in response, Naumovski told her that what had happened to Kathy was not his business, that his concern was whether Linda could do the job he required. He allegedly told her to follow proper procedures and the policies he had set and to show him respect. Naumovski corroborated Linda's testimony concerning her reference to the call to Jackson.

In a pretrial affidavit given to Respondent's attorneys, Naumovski had stated that his conversation with Linda Manville grew "out of Maureen Manville's telephone conference earlier that day with Richard Jackson." Upon being shown this affidavit, he first admitted and then

⁵ Maureen's testimony is uncontradicted. No weight can be given to Respondent's reference, on brief, to an alleged affidavit of Jackson which was neither received nor offered in evidence.

denied, as he had earlier in his testimony, that this interview resulted from the telephone calls. While both the affidavit and his testimony are somewhat ambiguous, I must conclude, from the timing of his conference with Linda Manville and his subsequent reference to Linda as "inciting" Maureen, as discussed *infra*, that whatever ambiguity exists must be resolved against Respondent. I find that Naumovski called Linda Manville into his office because of her role in the telephone calls to, and Maureen's conversation with, Richard Jackson.

Their meeting ended, according to Naumovski, when Linda Manville walked out "halfway through [the] conversation," stating that she had to take care of business. Linda denied walking out of that meeting. Subsequently, Naumovski asked Linda to stay and talk with him after the restaurant closed that evening; she told him that she was unable to do so and left.

On the following afternoon, Saturday, November 21, Claro told Maureen that Linda and Naumovski had conversed on Friday, that Naumovski did not appreciate what Linda had said, and that Naumovski was going to talk to her again when she came that night. When Linda came in, Claro told her that Naumovski was very upset and was going to fire her. Linda confronted Naumovski in the kitchen, questioning whether she was to be discharged, and was again taken into the office. Naumovski told her that her attitude was poor and that she was terminated. She was requested to sign an already prepared notification of discharge and did so. That notice states, as the reason for termination:

Total lack of respect towards MGMT. & Company policies; inciting fellow emps. to same attitude.

Both the quantity and quality of her work were rated good, but Naumovski had rated her as "not acceptable" in the categories of job interest, work habits, cooperation, and attitude.

Naumovski's versions of the events precipitating the November 21 discharge and his version of the discharge interview, to the extent that they contradict Linda's, cannot be credited. Thus, although it is clear from both the fact that Naumovski had already written out Linda's discharge notice before he spoke to her on November 21, and from Claro's statements to Linda and Maureen, that Naumovski had determined to discharge Linda before their November 21 conversation, Naumovski initially denied that he had formed the intent to discharge her when their conversation began. He also testified initially that she made a derogatory remark about Respondent before he discharged her. The evidence clearly establishes that the remark, if made it at all, came as a response to the discharge. Naumovski testified that he spoke to Linda at this time about her alleged failure to follow his policies regarding the use of sizzler plates and foil-wrapped baked potatoes; it is clear that this problem arose only in the first couple of days after he came to Riverview and it was at that time that he spoke to her about it. In this respect, I note that Naumovski's affidavit omits any reference to the sizzler plate and baked potato matters as having been mentioned on November 21. I note, also, that it was only when he was responding to

questions by the Administrative Law Judge, after extensive direct and cross-examination, that Naumovski claimed that it was a complaint from a customer about Linda's service, allegedly related to him by Claro and then repeated by the customer, that precipitated the discharge. I find it difficult to believe that so significant an event would, if true, have been omitted from direct examination. Moreover, Claro, while testifying about Linda's alleged deficiencies, made no mention of this alleged complaint and Naumovski's testimony about her alleged failure to properly serve the restaurant's clientele is inconsistent with his appraisal of the quality of her work as "good."⁶

Naumovski testified that the "inciting" to which the discharge notice referred was Linda's "inciting" of the other employees on her shift to bad attitudes similar to her own. However, the only employee he could name as having been "incited" by her was Maureen. Maureen was the other employee involved in the calls to Jackson and the one to whom Jackson actually spoke.

Linda Manville had never previously been disciplined for breaches of conduct or poor attitude.

B. Analysis and Conclusions

The General Counsel, relying solely on the events of November 20 and 21, contends that Linda Manville was discharged for having engaged in protected concerted activities. I believe this contention is supported by a preponderance of the record evidence.

The uncontradicted testimony establishes that Linda and Maureen Manville jointly placed calls to Richard Jackson on November 20. When he returned those calls, Jackson asked to speak to either of them and was connected with Maureen. In her conversation, Maureen brought employee complaints about staffing and scheduling, unquestionably "working conditions,"⁷ which had been the subject of concerted employee discussions for nearly a month, to his attention. Additionally, she voiced concerns, expressed by virtually all of the employees, over Kathy's termination. Kathy had been a popular manager, related to several of the witnesses, and unquestionably some of the unhappiness engendered by her termination stemmed from these factors. Additionally, however, it appears that in exercising her managerial respon-

⁶ Naumovski testified that the bad attitude to which he referred in the discharge notice was Linda Manville's alleged failure to properly serve the customers. His description of Linda's work attitude is, to a certain extent, corroborated by the testimony of two employees and one supervisor. Thus, waitress Ann Sherman observed that, while everyone was upset about Kathy's termination, Linda and Maureen both had frequent emotional outbursts in the period following that termination. To her, it appeared that there were changes in Linda's behavior and attitude; she noticed that Linda did not like the new management. Similarly, William Movinski, a cook, reported that Linda's attitude toward the Company deteriorated after her sister's termination. He saw her slamming plates and other equipment around loudly, observed her arguing with Jean Hogan on several occasions, and heard her say "Mr. Steak sucks" in the break area. Others, he admitted, had also been heard to make derogatory comments about the Company; it was not that unusual. Galley Supervisor Claro also testified to having observed similar conduct and attitudes on Linda's part.

⁷ *Hawthorne Mazda*, 251 NLRB 313 (1980), enf. 108 LRRM 2344 (9th Cir. 1981); *Misericordia Hospital Medical Center*, 246 NLRB 351 (1979), enf. 623 F.2d 808 (2d Cir. 1980).

sibility over staffing and scheduling, Kathy had been able to accommodate the needs and desires of those she supervised for work during certain hours and days or time off at other times. After she left, the employees encountered difficulties in scheduling and staffing, perhaps as a result of the inexperience or different interests of her replacements. Kathy thus had a direct impact upon the job interests of the employees; they were legitimately concerned with her identity and continued presence and they had a protected right to protest her termination.⁸

Several facts help establish that it was this exercise of the statutory right to concertedly protest matters affecting working conditions which caused Naumovski to call Linda in and discharge her. First, of course, are his admissions and my finding that the telephone calls prompted him to speak to Linda. This conclusion follows, also, from the timing. Naumovski's first conversation with Linda occurred only a few hours after Jackson returned the Manvilles' calls. Additionally, there is Naumovski's reference to Linda inciting "other employees and his ability to point to any employee except Maureen, the person to whom Jackson spoke, as having been "incited." Finally, I note the vague, shifting, and often contradictory testimony of Naumovski concerning his observations of Linda's behavior, his conversations with her, and his reasons for terminating her. Such testimony tends to support my conclusion that the real motivation was her protected concerted activity.

Respondent has adduced evidence tending to show that, at least after her sister's termination, Linda Manville had become less than an entirely desirable employee. Her attitude, as demonstrated by a lack of cheerfulness and expressions of unhappiness, including perhaps rough handling of dishes and other equipment, the forceful opening or closing of doors, and some derogatory remarks about her employer, would not, I believe, have resulted in her discharge absent the protected concerted activity. Others had engaged in similar behavior without discipline or discharge. Moreover, the derogatory remarks attributed to her were not made in the presence of customers and there is no evidence that Naumovski either heard or was told about such remarks until after her discharge.

Accordingly, I must conclude that the General Counsel has established, by a preponderance of record evidence, that Respondent discharged Linda Manville because of her protected concerted activities, in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By discharging Linda Manville because she engaged in protected concerted activities, Respondent has violated Section 8(a)(1) of the Act.

⁸ See *Fibracan Corp.*, 259 NLRB 161 (1981), involving the termination of a popular supervisor who had demonstrated particular concern for the employees' safety and had aided them in achieving top productivity. See also *S. L. Industries*, 252 NLRB 1058 (1980), and *Puerto Rico Food Products*, 242 NLRB 899 (1979), where employee protests over the termination of supervisors who had direct impact on their job interests (including representation of their interests to management and advising them on their statutory rights) were held protected.

2. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As I have found that Respondent discriminatorily discharged Linda Manville because she engaged in protected concerted activities, I shall recommend that Respondent be required to offer her immediate and full reinstatement to her former or a substantially equivalent position without prejudice to her seniority or other rights and privileges and to make her whole for any loss of pay or other earnings she may have suffered as a result of the discrimination against her. Any backpay found to be due shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).⁹ Additionally, I shall recommend that Respondent be required to rescind and expunge from its personnel files and other records any references to the November 21, 1981, discharge of Linda Manville.

Upon the foregoing findings of fact and conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁰

The Respondent, Mr. Steak, Inc., Riverview, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Discharging employees because they engage in protected concerted activities.
 - (b) In any like or related manner interfering with employees in the exercise of the rights guaranteed them under Section 7 of the Act.
2. Take the following affirmative action which is necessary to effectuate the policies of the Act:
 - (a) Offer Linda Manville immediate and full reinstatement to her former job or, if that is not possible, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of the discrimination against her, in the manner set forth in the section of this Decision entitled "The Remedy."
 - (b) Expunge from its personnel files or other records all references to the November 21, 1981, discharge of Linda Manville.
 - (c) Post at its Riverview, Michigan, facility copies of the attached notice marked "Appendix."¹¹ Copies of said

⁹ See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

¹⁰ In the event no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

notice on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, in conspicuous places, including all

¹¹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

places where notices to employees are customarily posted, and shall be maintained for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.